

1 employment because of his association with another who is disabled, or a member of another protected
 2 class under FEHA. ARC's attempt to restrict protection under FEHA is not based on any relevant
 3 statutory or relevant case law authority. Likewise, Setencich sufficiently pleads his second and third
 4 claim for fraudulent and negligent misrepresentation, respectively, warranting denial of the motion in
 5 its entirety.

6 II

7 FACTUAL BACKGROUND AND PROCEDURAL HISTORY

8 Setencich was recruited in mid to late 2005 to work as the Communications Manager for the
 9 ARC, reporting to the Director of Public Affairs and Communications, Marc Jackson ("Jackson") (First
 10 Amended Complaint ("FAC"), ¶2). Setencich was qualified for the position, filling an important need
 11 for the ARC (FAC, ¶2). Setencich met with the principals and hiring panel on three separate occasions,
 12 with the decision being made by the Board to hire Setencich (Complaint, ¶15) Defendants Steve Brown
 13 and Robert Browning represented to Setencich they wanted to hire him, would be hired, and that his
 14 1997 conviction of filing a false tax return concerning tax consequences of less than \$10,000.00 was not
 15 an impediment to hire (FAC, ¶24 and 25). However, neither intended on letting the panel proceed with
 16 the hire Setencich because of Setencich's association with Jackson (FAC, ¶15-17). ARC was attempting
 17 to terminate the Director of Public Affairs and Communication (Jackson) by taking pretextual discipline
 18 against him, defaming him and setting him up to fail by providing him inadequate support. The action
 19 against Jackson were motivated by Jackson's disability, use of medical leave and protected activity
 20 (FAC, ¶3 and 15).

21 The hire of Setencich would have impeded the principals efforts to terminate Jackson given
 22 Setencich's knowledge and political clout. ARC's managing agents, Steve Brown and Robert Browning,
 23 never intended on hiring Setencich given his association with Jackson (FAC, ¶8 and 11). The
 24 association between Jackson and Setencich was based on several year of working closely together when
 25 Setencich was on the Fresno City Council and Jackson was the Director of Public Relations and Editor
 26 in Chief of the Metro News (FAC, ¶6). When Setencich was elected to the State Legislature and
 27 became Speaker of the House for the State Assembly, Jackson was his Chief of Staff. (*Ibid.*). The
 28 association continued when Setencich was Special Liaison to Mayor Willie Brown and Jackson began

1 working for ARC (FAC, ¶7).

2 Setencich filed his complaint in San Francisco Superior Court on March 13, 2007. Defendant
3 ARC removed the case on July 19, 2007 on the alleged basis that ARC must be sued in federal court
4 because of a federal corporate charter (36 U.S.C. §2). Defendant ARC alone filed a motion to dismiss
5 on July 24, 2007. In response, Setencich filed his first amended complaint on November 8, 2007. In
6 November 27, 2007 each defendant filed a motion to dismiss Setencich's First Amended Complaint.

7 III

8 LEGAL ANALYSIS

9 A. The Legal Standard on a Motion to Dismiss

10 A complaint should not be dismissed for failure to state on claim under Fed. Rule Civ. Procedure
11 12(b)(6) "unless it appears beyond doubt that a plaintiff could prove no set of facts in support of his
12 claim which would entitle him to relief." *Durning v First Boston Corp.* 815 F.2d 1265, 1267 (9th Cir.
13 1987) (quoting *Conley v. Gibson*, 355 U.S. 41, 26 Ed. 2d 80 (1957)). Sufficient facts exist to support
14 Setencich's three claims for Association Discrimination, Fraud and Negligent Misrepresentation. The
15 Association Discrimination and Negligence Misrepresentation claims have been sufficiently pled. As
16 to the Fraud claim, leave to amend is requested to provide the specifics to the fraud as articulated in
17 *Lazar*. ARC has brought a motion based exclusively on non-9th Circuit cases interpreting the
18 Americans With Disabilities Act ("ADA") and not the FEHA, on which Setencich's discrimination
19 claim is based.

20 The Federal Rules of Civil Procedure govern the sufficiency of a pleading in a federal action,
21 even those based on diversity. (*FSLIC v. Texas Real Estate Counselors* 995 F.2d 261, 269-270 (5th Cir.
22 1992.) The Rules are extremely liberal and are designed specifically to minimize disputes over pleading
23 technicalities. (See FRCP 1, 8(f), and *Conley, supra*, at 47-48.)

24 Federal Rules provide for notice pleading. The pleadings need not allege facts constituting the
25 claim for relief or defense. They need only give fair notice of the pleader's claim so the opposing party
26 can respond, undertake discovery and prepare for trial. (See *Conley v. Gibson, supra*, 355 U.S at 47-48).
27 "[F]ederal Courts and litigants must rely on summary judgment and control of discovery to weed out
28 unmeritorious claims . . ." (*Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,

507 U.S. 163 (1993).) Unlike the practice in many states, the Federal Rules do not draw distinctions between pleading facts, ultimate facts or conclusions of law. (Schwarzer, Tashima & Wagstaffe, CAL. PRAC. GUIDE: CIV PRO BEFORE TRIAL (The Rutter Group 2002) 8:27; pp. 8-6.) Setencich properly pleads the necessary facts as to the first and third claim to put ARC on notice of the claim brought against it. As to the fraud claim, facts exist to meet the specificity requirements under California law.

In ruling on a motion to dismiss, all allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. (*Id.*) The plaintiff is not held to a “heightened pleading standard.” (*Swierkiewicz v. Sorema*, N.A. 534 U.S. 506, 515, 152 L.Ed. 2d 1 (2002).) If the Court should find that Setencich failed to provide sufficient allegations to state a claim for which relief may be granted, respectfully request the Court grant leave to amend. A District Court should grant leave to amend even if no request to amend the pleadings was made, unless it determines that the plaintiffs cannot be cured by the allegations of other facts. (*Lopez v. Smith*, 2003 F.3d 1122, 1127 (9th Cir. 2000).)

B. Association Discrimination

ARC contends that although FEHA prohibits discrimination based on association, the protection should be severely limited, relying on the 7th Circuit case *Larimer v. International Business Machines Corp.* 370 F.3d 698, 700 (7th Cir. 2004) where the Court elected not to provide protection under the American With Disabilities Act (“ADA”) to a man who was terminated after the birth of his premature twins. However, the 9th Circuit has not adopted this restrictive view. Of most significance, the Setencich claim is under FEHA, which provides significantly more protections than the ADA.

California Government Code §12926(m) provides,

“race . . . physical disability, mental disability, medical condition . . . includes a perception that the person has any of those characteristics *or that the person is associated with a person who has or is perceived to have any of those characteristics.*” California Government Code §12926 (Emphasis added.)

The ADA more restrictive association discrimination protection² provides:

²In order to establish a prima facie case under the ADA for association discrimination, a plaintiff must prove (1) the plaintiff was qualified for the job at the time of the adverse employment action; (2) the plaintiff was subjected to adverse employment action; (3) plaintiff was known by his employer to have an associate with a disability; (4) the adverse employment action occurred under circumstances raising a reasonable inference that the disability of the associate was a determining factor in the employer’s

1 “... excluding or otherwise denying equal jobs or benefits to a qualified individual
2 because of a *known disability of the individual with whom the qualified individual is*
3 *known to have a relationship or association.*” 42 U.S.C. §12112(b)(4) (Emphasis
4 added.)

5 Setencich pleads the prima facie elements of association discrimination under FEHA:

6 (1) Setencich applied for a position with the Red Cross (FAC, ¶2, 14-15); (2) ARC refused to hire him
7 (FAC ¶15, 17 and 18); and (3) Setencich’s association with Jackson (who has a disability and engaged
8 in protected activities) was a motivating factor in not hiring him (FAC, ¶18). (Judicial Council of
9 California Civil Jury Instructions (2007) CACI No. 2500). As a result, the motion as to this claim
10 should be denied.

11 FEHA provides broader protections for the employee than the federal statutes. California
12 Government Code §12926.1 identifies that although the ADA provides a floor for protection, FEHA has
13 always, even prior to the passage of the Federal Act, afforded additional protections. The Supreme
14 Court explained in *Aguilar v. Avis Rent A Car, Inc.* 29 Cal 4th 121 (1999) that FEHA declares,

15 ‘As a public policy of the state that it’s necessary to protect and safeguard the right and
16 opportunity of all persons to seek, obtain, and hold employment without discrimination.
17 This Court has declared that policy to be fundamental.’ (citing *Brown v. Superior Court*
18 37 Cal 3rd 477, 485 (1984). ‘Employment discrimination foments domestic strife and
19 arrest, deprives the state of the fullest utilization of its capacities for development an
20 advance, and substantially and adversely affects the interest of employers and the public
21 in general’ (citing California Government Code §12920) The express purpose of the
22 FEHA is to ‘provide effective remedies which will eliminate such discriminatory
23 practices’. (*Ibid.*) In addition, the legislature has directed that the FEHA to be construed
24 liberally so as to accomplish its purpose. California Government Code §12993; citing
25 *Brown v. Superior Court*, supra, 37 Cal 3d at 486; *Aguilar v. Avis* at 129.

26 Defendant argues the allegations in the complaint refute Setencich’s contention that he was not
27 hired because of his relationship with Jackson. However, ARC fails to provide any substance to the
28 argument. Jackson recruited Plaintiff to be the Communications Director to fill an important need for
29 Jackson to accommodate Jackson’s disability, the growth of the Department and to counter attempts by
30 Brown and Browning to undermine Jackson and set him up to fail (FAC ¶16). ARC argues that it makes
31 no sense for ARC (through the actions of Jackson as a managing agent of the defendant) to make a
32 concerted effort to fill the Communications Manager position, but then not hire Plaintiff because of his

33 decision. *Hartog v. Wasatch Academy, et al* 129 F 3d 1076 (3rd Cir., 1997)

1 association with Jackson. However, Jackson usually was able to hire staff on his own. Jackson recruited
 2 to fill the position. Defendant contends he is a managing agent. (Telfer Decl., ¶8) At no time did Brown
 3 or Browning, Jackson's superiors who are also managing agents of ARC ever intend on letting Jackson
 4 fill the position with someone who would support him.

5 Setencich properly pleads his FEHA claim, which provides protection to Setencich for the failure
 6 to hire motivated by his association with Jackson. As a result, the motion should be denied.

7 C. Fraud

8 Setencich provides the circumstances of Defendants' fraud with specificity in his First Amended
 9 Complaint sufficient to defeat Defendant's motion. Defendant ARC relies on stock security cases,
 10 which require a higher standard of specificity in pleading based on the Private Securities Litigation
 11 Reform Act. (See Defendant's moving papers citing *Desaigoudar v. Meyercord* 223 F.3d 1020, 1022
 12 (9th Cir. 2000))

13 Federal Rule of Civ. Procedure 9(b) provides:

14
 15 . . . In all averments of fraud or mistake, the *circumstances* constituting fraud
 16 or mistake shall be stated with particularity, *malice, intent, knowledge, and other*
condition of mind of a person may be averred generally. (Emphasis added)

17 "The purpose of FRCP 9(b) is to provide notice, not to test the factual allegations of the claim."
 18 (*Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C.*, 331 F.3d 406, 414 n.2 (3d
 19 Cir.2003)). Setencich does plead the circumstances constituting the fraud with particularity to put
 20 defendant on notice. The First Amended Complaint provides,

21
 22 Defendants made specific representations that it intended to hire Plaintiff which
 23 brought plaintiff down to Southern California on three occasions. During Plaintiff's first
 24 visit, he informed defendants that he had been convicted of filing a false tax return in
 1997..with tax consequences of less than \$10,000.00. First Amended Complaint ("FAC")
 ¶24

25 In late 2005, Defendant Brown took Setencich aside, put his arm around him and told
 26 Setencich they had worked with people with criminal backgrounds before; they liked to
 27 give people second chances; they hire people for what they can bring to the table; and
 28 they wanted to hire Plaintiff. Brown reiterated this to Plaintiff in approximately March,
 2006. Browning also told Plaintiff that his criminal background would not impede his
 hire. These statements were republished to Setencich and others, confirming he would
 be hired, until approximately the summer of 2006. FAC ¶25

1 In addition to providing the circumstances of the fraud with particularity, Setencich also pleads
 2 generally to malice and animus of ARC's managing agents. While the 'actual fraud alleged must be
 3 stated with particularity the requisite intent of the alleged [perpetrator of the fraud] need not be alleged
 4 with great specificity. *Wight v. Bankamerica Corp.* 219 F.3d 79, 91 (2d Cir. 2000) FRCP 9(b). The
 5 Court in *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410,1418 (3d Cir.1997) provides

6 "The normally rigorous particularity rule has been relaxed somewhat where the factual
 7 information is peculiarly within the defendant's knowledge or control. But even under a relaxed
 8 application of FRCP 9(b), boilerplate and conclusory allegations will not suffice. While state of mind
 9 may be averred generally, plaintiffs must still allege facts that show the court their basis for inferring that
 10 the defendants acted with 'scienter.'" *See also Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041,1051
 11 (7th Cir.1998).

12 Here, Setencich Plaintiff alleges on information and belief that...at all times relevant herein,
 13 Defendants, and each of them, have actively participated in the fraud, misrepresentation against plaintiff
 14 because of his association with Jackson, who has a disability under FEHA and who has been subjected
 15 to discrimination with his disability as a motivating factor. FAC ¶11.

16 The decision was made to hire Setencich. However, when defendants learned of
 17 Setencich's association with Jackson, who they were attempting to force out given his
 18 use of family medical leave, disability, and protected activity, they attempted to withdraw
 19 the decision. FAC ¶15.

20 Setencich provides sufficient specificity as to the circumstances of ARC's fraud and his requisite
 21 animus and as a result, Setencich respectfully requests the Court to deny dismissal of this claim.

22 **D. Negligent Misrepresentation**

23 The elements of a claim for negligent misrepresentation are as follows: (1) the defendant must
 24 have made a representation as to a past or existing material fact; (2) that representation must have been
 25 untrue; (3) regardless of his actual belief defendant must have made the representation without any
 26 reasonable ground for believing it to be true; (4) the representation must have been made with the intent
 27 to induce the plaintiff to rely upon it ;³ (5) the plaintiffs must have been unaware of the falsity of the
 28 representation; (6) the plaintiffs must have acted in justifiable reliance upon its truth; and (7) the

1 plaintiffs must have sustained damages as a result of such reliance. *See In Re Heritage Bond Litigation*
 2 *v. Kasirer, et al.* 289 F Supp 1132 (2003) “ Where the defendant makes false statements, honestly
 3 believing they are true, but without reasonable ground for such belief, he may be liable for negligent
 4 misrepresentation. *Bily v. Arthur Young & Co.* , 3 Cal 4th 370, 407(1992)

5 ARC moves to dismiss this claim contending Setencich has not alleged a misrepresentation to
 6 a past or existing fact, intent to induce reliance, justifiable reliance or damages. However, Setencich
 7 pleads: Defendants made specific representations that it wanted to hire Setencich with confirmation he
 8 would be hired. (FAC ¶25) These statements were republished to Setencich and others, confirming he
 9 would be hired. The statements were misrepresentations of an existing fact since at the time they were
 10 made defendant had not intent on hiring plaintiff.

11 Sentencich pleads intent to induce reliance and justifiable reliance in FAC ¶2, 8, 11, 14, 24-37
 12 and 31. Finally, Setencich pleads his damages.

13 Defendants’ representations as relied from above, including plaintiff being told
 14 he was to be hired, where plaintiff lost income, not only in travel and time, but made it
 so he was unable to secure other employment FAC .¶32

15 As a result, the claim is sufficiently pled and the motion as to this claim should be
 16 denied.

17 IV

18 CONCLUSION

19 Setencich has pled facts sufficient to support his first, second and third claims against Defendant
 20 ARC for Association Discrimination, Fraud and Negligent Misrepresentation to warrant denial of the
 21 motion. If the court is inclined to grant any aspect of Defendant’s motion, Setencich respectfully
 22 requests leave to amend.

23 Dated: January 22nd, 2008

LAW OFFICES OF JILL P. TELFER
 A Professional Corporation

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 27 JILL P. TELFER
 Attorney for Plaintiff BRIAN SETENCICH
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PROOF OF SERVICE

CASE: Setencich v. The American Red Cross, et al.
COURT: USDC, Northern District, Oakland Division
CASE NO. C 07-03688 SBA

I declare that I am a citizen of the United States, that I have attained the age of majority, and that I am not a party to this action. My business address is 331 J Street, Sacramento, CA 95814. I am familiar with this firm's practice of collection and processing of correspondence to be deposited for delivery via the U.S. Postal Service as well as other methods used for delivery of correspondence. On the below stated date, in the manner indicated, I caused the foregoing document(s) entitled:

**PLAINTIFF BRIAN SETENCICH'S OPPOSITION TO DEFENDANT
AMERICAN RED CROSS' SECOND MOTION TO DISMISS PLAINTIFF'S
FIRST AMENDED COMPLAINT**

to be served on the party(ies) or their (its) attorney(s) of record in this action by:

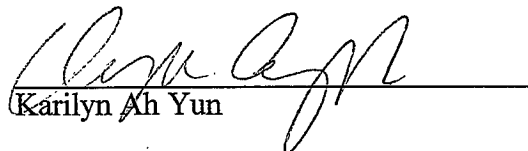
☒ Facsimile transmission to the number(s) noted below.

☐ Placing a true copy thereof in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail and addressed as indicated below. Said documents will be deposited with the U.S. Postal Service at Sacramento, California on this date in the ordinary course of business. I understand that upon motion of a party served service shall be assumed invalid if the postal cancellation date or postage meter date on the envelope is more than one (1) day after the date of deposit for mailing as contained in this declaration.

☐ Hand-delivery addressed to:

**Sabrina L. Shadi, Esq.
BAKER & HOSTETLER
12100 Wilshire Boulevard, 15th Floor
Los Angeles, California 90025-7120
fax - (310) 820-8859**

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 22, 2008, in Sacramento, California.


Karilyn Ah Yun